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**APV Hill & Mills (M) Sdn Bhd v
AQ-Pacific Wide Sdn Bhd & Anor**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-530 OF
1999
ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND RICHARD
MALANJUM JJCA
14 JULY 2005

C

*Civil Procedure — Appeal — Facts, finding of — Interference by appellate court —
Circumstances where appellate court will interfere with conclusion of first instance court*

D

*Shipping and Navigation — Carriage of goods — Transshipment — Meaning of —
Feeder vessel used to transport goods to port in transit for loading onto different vessel for
delivery of equipment to final destination — Whether such arrangement constitutes
transshipment*

E

The defendant contracted with JOWFE — for the supply of certain equipment. The defendant also entered into a contract with the plaintiff for the plaintiff to manufacture and ship the equipment from Malaysia to Benghazi. The contract between the defendant and the plaintiff, as amended, provided, inter alia, for: (i) the shipment of the equipment on a cost and freight ('CF') basis to Benghazi at a price of RM1,523,000; (ii) a prohibition with regard to the transshipment of the equipment; (iii) an advance payment of RM1,000,000 by the defendant to the plaintiff in return for a performance bond; (iv) the defendant to prepare a letter of credit ('LC') for the balance RM523,000. This LC also repeated the prohibition on the transshipment of equipment to Libya. The LC originally stipulated that shipment of the equipment was to be from Shah Alam/Port Klang but it was later amended to allow shipment from Singapore. Transshipment of the equipment was again

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prohibited. However the plaintiff arranged with the third party — a freight forwarder for shipment of the equipment out of Port Klang to Singapore, using the vessel *Seng Leong*. In Singapore, the equipment was to be warehoused whilst awaiting the arrival of the vessel *Lady Jane*. The equipment was then to be loaded onto the *Lady Jane* for its journey to Benghazi. The equipment was sent to Singapore but complications arose and the equipment never reached Benghazi. The defendant executed on the performance bond whereas the plaintiff failed to obtain the balance RM523,000. The plaintiff sued: (i) the defendant inter alia to recover the balance RM523,000 and to restrain the defendant from calling upon the performance bond; (ii) the third party for an indemnity against any amount adjudged due from the plaintiff to the defendant. At first instance the plaintiff obtained an interlocutory injunction to

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restrain the defendant from calling upon the performance bond. The defendant counterclaimed to set aside the interlocutory injunction and to recover damages. The High Court however dismissed the plaintiff's actions against the defendant and the third party and instead allowed the defendants counterclaim. The plaintiff thus appealed to the Court of Appeal.

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Held, dismissing the plaintiff's appeal with costs:

- (1) The Court of Appeal will not come to a conclusion, on the facts, different from a conclusion reached by the first instance court unless the conclusion reached by the first instance court is so unreasonable that no reasonable tribunal would have come to that conclusion. In the instant case, the first instance court did not reach such an unreasonable conclusion (see para 17).
- (2) In so far as the defendant was concerned, transshipment of the equipment was prohibited. Howsoever the plaintiff chose to ship the equipment to Singapore therefore had to be in compliance with the transshipment prohibition. The third party had presented the plaintiff with proper transportation advice but it was the plaintiff who decided to use the feeder vessel *Seng Leong* to transport the equipment to Singapore for its discharge and onward journey to Benghazi onboard the *Lady Jane*. The defendant did not know of this arrangement and could not be clothed with the knowledge of the transshipment to stop it from objecting to the plaintiff's claim that the defendant had acquiesced to the transshipment arrangement (see para 19).
- (3) Transshipment means the transporting of cargo by means of a vessel to an export vessel which is to take the goods to its port of destination. Further, storage on land for a period will not necessarily alter a transshipment journey of goods. In the instant case, there was clearly a transshipment of goods when the plaintiff chose to use the feeder vessel *Seng Leong* to transport the equipment from Port Klang to Singapore before being loaded onto the *Lady Jane* for carriage to Benghazi (see paras 21–22); *Houlder Brothers & Co v The Merchants Marine Insurance Company, Limited* [1886] 17 QBD 354 referred and *Anglo-American Oil Company, Limited v Port of London Authority* [1914] 1 KB 14 followed.
- (4) In the instant case, the trial judge did not err in dismissing the plaintiff's action against the defendant and allowing the defendant's counterclaim. The trial judge did not also err in finding the third party not liable (see paras 24, 27).

[Bahasa Malaysia summary]

Defendan mengikat kontrak dengan JOWFE — untuk bekalan peralatan tertentu. Defendan juga telah memasuki satu kontrak dengan plaintif agar plaintif dapat membuat dan menghantar peralatan itu daripada Malaysia ke Benghazi. Kontrak antara defendan dan plaintif, seperti yang dipinda, memperuntukkan, antara lain, untuk: (i) penghantaran peralatan-peralatan itu atas dasar kos dan penghantaran ('KP') ke Benghazi pada harga RM1,523,000; (ii) satu larangan berkaitan pemindahan peralatan itu ke kapal; (iii) bayaran pendahuluan RM1,000,000 oleh defendan kepada plaintif sebagai balasan satu pelaksanaan bon; (iv) defendan menyediakan surat kredit ('SK') untuk baki RM523,000. SK ini juga mengulangi larangan tentang pemindahan peralatan itu ke kapal ke Libya. SK itu pada asalnya menyatakan bahawa penghantaran peralatan itu hendaklah daripada Shah Alam/Port Klang tetapi kemudiannya telah dipinda untuk membenarkan penghantaran daripada Singapura. Pemindahan peralatan itu ke kapal juga dilarang di sini. Bagaimanapun plaintif telah menguruskan dengan pihak ketiga — perkhidmatan penghantaran untuk menghantar peralatan itu daripada Port Klang ke Singapura,

- A** menggunakan kapal *Seng Leong*. Di Singapura, peralatan itu sepatutnya diletakkan di gudang sementara menunggu ketibaan kapal *Lady Jane*. Peralatan itu kemudiannya sepatutnya dimuatkan ke *Lady Jane* untuk dibawa ke Benghazi. Peralatan itu telah dihantar ke Singapura tetapi berlaku kesulitan dan peralatan itu tidak sampai ke Benghazi. Defendan telah menyempurnakan pelaksanaan bon manakala plaintif
- B** telah gagal untuk memperoleh baki RM523,000. Plaintif telah menyaman: (i) defendan, antara lain, untuk mendapat balik baki RM523,000 dan untuk menghalang defendan daripada memohon pelaksanaan bon; (ii) pihak ketiga untuk satu indemniti terhadap apa-apa jumlah yang diputuskan perlu dibayar daripada plaintif kepada defendan. Pada awalnya, plaintif memperoleh satu injuksi interlokutori untuk menghalang defendan daripada memohon pelaksanaan bon.
- C** Defendan telah membuat tuntutan balas untuk mengenepikan injuksi interlokutori itu dan mendapat balik ganti rugi. Mahkamah Tinggi bagaimanapun telah menolak tindakan-tindakan plaintif terhadap defendan dan pihak ketiga dan sebaliknya telah membenarkan tuntutan balas defendan-defendan. Plaintif oleh itu telah merayu ke Mahkamah Rayuan.
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Diputuskan, menolak rayuan plaintif dengan kos:

- E** (1) Mahkamah Rayuan tidak akan tiba ke satu kesimpulan, berdasarkan fakta, yang berbeza daripada kesimpulan yang diputuskan oleh mahkamah yang terdahulu membicarakan kes kecuali di mana kesimpulan yang diputuskan oleh mahkamah terdahulu tidak munasabah di mana tiada tribunal yang munasabah akan membuat kesimpulan sedemikian. Dalam kes semasa, mahkamah terdahulu tidak membuat kesimpulan yang tidak munasabah (lihat perenggan 17).
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- G** (2) Setakat mana defendan adalah berkaitan, pemindahan peralatan itu ke kapal adalah dilarang. Namun plaintif telah memilih untuk menghantar peralatan itu ke Singapura yang perlu mematuhi larangan pemindahan tersebut. Pihak ketiga telah mengemukakan kepada plaintif nasihat pengangkutan yang betul tetapi plaintif telah membuat keputusan untuk menggunakan kapal penghantar *Seng Leong* untuk membawa peralatan itu ke Singapura untuk dipunggahkan muatannya dan seterusnya diangkut ke atas *Lady Jane* untuk ke Benghazi. Defendan tidak mengetahui tentang urusan ini dan tidak boleh dianggap mempunyai pengetahuan tentang pemindahan kapal tersebut untuk menghalangnya daripada membantah tuntutan plaintif bahawa defendan telah bersetuju terhadap urusan pemindahan kapal tersebut (lihat perenggan 19).
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- I** (3) Pemindahan ke kapal bermaksud membawa kargo dengan kapal ke satu kapal pengeksport yang akan membawa barangan tersebut ke pelabuhan destinasi. Dan, penyimpanan atas darat untuk satu tempoh itu tidak semestinya mengubah destinasi pemindahan barangan ke kapal. Dalam kes semasa, jelas terdapat pemindahan barangan ke kapal apabila plaintif memilih untuk menggunakan kapal penghantar *Seng Leong* untuk membawa peralatan itu daripada Port Klang ke Singapura sebelum ia dimuatkan ke atas *Lady Jane* untuk dibawa ke Benghazi (lihat perenggan 21–22); *Houlder Brothers & Co v*

The Merchants Marine Insurance Company, Limited [1886] 17 QBD 354 dirujuk dan *Anglo-American Oil Company, Limited v Port of London Authority* [1914] 1 KB 14 diikuti.

- (4) Dalam kes semasa, hakim perbicaraan tidak terkhilaf apabila menolak tindakan plaintif terhadap defendan dan membenarkan tuntutan balas defendan. Hakim perbicaraan juga tidak terkhilaf apabila memutuskan pihak ketiga tidak bertanggungjawab (lihat 24, 27).]

Notes

For a case on transshipment, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1416. For cases on finding of facts, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 904–912.

Cases referred to

Anglo-American Oil Company, Limited v Port of London Authority [1914] 1 KB 14 (folld)

Houlder Brothers & Co v The Merchants Marine Insurance Company, Limited [1886] 17 QBD 354 (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)

Legislation referred to

Port of London (Port Rates of Goods) Provisional Order Act 1910 [UK] s 9

Rajendra Navaratnam (Sonia Abraham and Eileen Yeoh with him) (Azman, Davidson & Co) for the appellant.

Ramdas Tikamdas (Ernest Azad with him) (Ernest Azad & Associates) for the first respondent.

Bharti Seth (Bharti Seth & Associates) for the second respondent.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

[1] This is an appeal by the plaintiff against the decision of the learned judge in the High Court below given on 15 July 1999 dismissing its claim against both the respondents who were the defendant and the third party, respectively, and allowing the counterclaim of the defendant, AQ-PACIFIC WIDE SDN BHD. The third party is a ship forwarder appointed by the plaintiff for purpose of shipping the subject matter of the contract between the plaintiff and the defendant from Malaysia to Libya. The written judgment of the learned judge is to be found at pp 33–52 of the record of appeal. We completed hearing the submissions of parties on the appeal on 30 July 2003 and accordingly reserved our decision on the matter. We now give our decision on the appeal with our grounds.

[2] Having considered the records and the submissions by the counsel for the parties, both orally and in writing, we decide to dismiss the appeal with costs to both respondents and we, accordingly, affirm the decision of the learned judge. Herewith are our grounds for coming to that decision.

- A [3] The learned judge has produced a well-reasoned judgment and had in detail given the background facts leading to the suit initiated by the plaintiff against both the defendant and the third party. We need not repeat it here except to mention that initially, the defendant had a principal contract with a trade organization in Libya, known as Jamahiriya National Oil Well Fluid and Equipment ('JOWFE'), to supply certain specified equipment manufactured in Malaysia. For the supply of the equipment to JOWFE, the defendant entered into a contract with the plaintiff for the manufacture and supply of the equipment at the price of RM2,348,445, C&F from Malaysia port to Benghazi port in Libya with specific condition of no transshipment of the equipment on its way from Malaysia to Libya. The defendant paid 40% of the contract price to the plaintiff and in exchange for which the plaintiff furnished a bank guarantee. The contract between the plaintiff and the defendant, however, did not go through as expected, as the plaintiff was not able to ship the equipment under the C&F arrangement until further notice. The defendant applied for specific performance of the contract. On 8 January 1993, the High Court granted the order sought.
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- D [4] Following the order of the court, the plaintiff and the defendant worked out a compromise with the plaintiff agreeing to ship the equipment in its then existing state of completion. For this purpose, they entered into what is called an amended contract on 11 January 1993. It is upon this amended contract that the dispute again arose which results in the decision of the learned judge as earlier mentioned.
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- [5] The following are the terms of the amended contract between the plaintiff and the defendant:
- F (a) The defendant will accept the eight vessels and eight agitators in the present condition and state of completion.
- G (b) The plaintiff will arrange to pack as soon as possible under the defendant's supervision and prepare all relevant documentations for shipment on a C&F basis at the revised price of RM1,523,000. Shipping documentations is to satisfy the defendant's LC stipulations. (The defendant's LC stipulation is the one given by JOWFE in favour of the defendant in respect of the principal contract between the defendant and JOWFE prohibiting transshipment of the equipment)
- H (c) Free access shall be allowed to defendant's representatives to the plaintiff's premises through normal channels and the plaintiff shall provide all necessary assistance for inspection and verification.
- I (d) The defendant will advance payment of RM1,000,000 in exchange for a bank guarantee to be provided by the plaintiff by Saturday, 16 January 1993. The defendant shall call upon the guarantee in the event the plaintiff refuses to perform this amended agreement. The guarantee is to be valid for 90 days from the date of issue.
- (e) Also by Saturday, 16 January 1993, the defendant will prepare LC for balance of payment amounting to RM523,000 payable 10 days after presentation of shipping documents or 90 days from 16 January 1993 whichever is earlier.

- (f) Also by Saturday, 16 January 1993, the defendant will prepare LC for balance of payment amounting to RM523,000 payable 10 days after presentation of shipping documents or 90 days from 16 January 1993 whichever is earlier. A
- (g) In compliance with the LC stipulations prohibiting transshipment and if as a result of the prohibition shipping costs should exceed the amount provided in the plaintiff's contract of RM128,002 the defendant will reimburse the plaintiff the extra costs. B
- (h) The defendant may also nominate a suitable vessel within the agreed period.
- (i) In the event the plaintiff draws down on the LC after 90 days, the plaintiff will deliver the vessels and agitators to a warehouse nominated by the defendant in the Klang Valley. (This LC is the one given by the defendant in favour of the plaintiff pertaining to the amended contract mentioned in 5(e) above). C

[6] Pursuant to the amended contract, the defendant on 18 January 1993 paid the plaintiff a sum of RM1,000,000 and in exchange for the advance sum paid, the plaintiff furnished to the defendant a performance bond issued by a bank to the defendant guaranteeing payment to the defendant in the event of default by the plaintiff. This is in compliance with item 5(d) above. D

[7] As to the LC upon the balance sum of RM523,000, it was provided by Hong Kong Bank which stipulates the same condition as the LC given by JOWFE to the defendant prohibiting transshipment of the equipment from Malaysia to Libya. This is to comply with item 5(e) above. The shipment is to be from Shah Alam/Port Klang to Libya or beneficiary's godown, which subsequently, however, was amended to allow shipment from Singapore but still with the prohibition of transshipment of the cargo to Libya. E

[8] Upon entering into the amended contract, the plaintiff went busy looking for shipping agent/s to have the equipment sent to Libya. Through the introduction of the defendant, the third party was on 20 January 1993 appointed by the plaintiff to be the ship forwarder for the export of the equipment. It was agreed by the defendant and JOWFE, to the knowledge of the plaintiff, that a ship *Lady Jane* was to be used to transport the equipment. However, this ship would stop only in Singapore and not at Port Klang, Malaysia. So as to comply with the stipulation contained in the LC of no transshipment, the forwarder put up two proposals to the plaintiff, ie that the equipment could either be carried on land to Singapore or be loaded at Port Klang by any other ship for a straight journey to Benghazi. The plaintiff disagreed to either of the proposals put up by the third party forwarder. The forwarder then informed the plaintiff of the existence of a feeder vessel *Seng Leong* plying between Port Klang and Singapore to which the plaintiff agreed in order to transport the equipment from Malaysia to Libya. F

[9] The following day, 21 January 1993, the plaintiff sent a fax to its head office in Singapore stating that there would be a feeder vessel *Seng Leong* for the shipment from Port Klang to Singapore and from there, shipment would be on the mother ship *Lady Jane* to Benghazi, scheduled for the first week of March 1993. By another letter of 28 January 1993, the plaintiff informed its Singapore head office that the G

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A equipment had been delivered to Port Klang and the feeder vessel *Seng Leong* was in Port Klang awaiting for a berth expected to be available on 29 January 1993 for the equipment to be loaded on to it for onward journey to Singapore to await *Lady Jane*. These were done without the knowledge of the defendant.

B [10] A customs form entitled 'Declaration of Goods to be exported' dated 30 January 1993 prepared by the plaintiff's shipping officer confirms that the equipment were loaded on a feeder vessel *Seng Leong* from Port Klang. However, the bill of lading dated 2 February 1993 upon which the plaintiff relies for performance of the amended contract and to draw down on the LC for the balance sum of RM253,000 shows that the place of receipt and loading of the equipment was Port Klang on the ocean vessel *Lady Jane* and the port of discharge to be Benghazi. There was no mention made at all of Singapore port and the feeder vessel *Seng Leong* originating from Port Klang in the said bill of lading. The column for 'precarriage by' was left blank. This creates an impression that there was no transshipment of the equipment from Malaysia to Libya.

D [11] To cut the story short, the equipment went on the feeder vessel *Seng Leong* on its journey from Port Klang to Singapore. In Singapore, it was kept at a godown there waiting to be taken over by the mother ship *Lady Jane*. Problem arose with the authority in Singapore and the equipment was asked to be removed from there.

E The third party requested from the plaintiff for instructions for the equipment to be brought back from Singapore to Port Klang. However, the plaintiff replied that it has no further interest in the equipment. In the end, the equipment never reached its destination, Benghazi. The plaintiff never got the benefit of the LC of the defendant in respect of the balance over the contract sum and at the same time there was a performance bond executed by it in the sum of RM1,000,000 in favour of the defendant. Hence, the prayers of the plaintiff in the suit against the defendant and the third party.

F [12] In his ground of judgment, the learned judge made the following findings:

G In the instant case, it would appear the defendant has absolutely lost the right to reject the equipment simply because the equipment was never shipped on board the ship named in the bill of lading nor shipped on any ship bound for the destination named in the bill of lading. The contract between the plaintiff and the defendant was a C&F contract. The equipment was never loaded on board the *Lady Jane* or any other ship bound for Benghazi, Libya. Due to this the ownership of the equipment at all material times remains with the plaintiff.

H [13] Then further down in his judgment, the learned judge says:

I Despite the prohibition against transshipment the plaintiff shipped the equipment on board the *Seng Leong* out of Port Klang on 2 February 1993 for reloading on another vessel *Lady Jane*. It was a fact that the equipment was never loaded on the *Lady Jane*. In the result the equipment was stranded in Singapore. The plaintiff had clearly not complied with the principal term of the contract regarding transshipment and therefore in breach of the agreement with the defendant.

It is also noted that the bill of lading dated 2 February 1993 upon which the plaintiff relies for performance of the contract and to draw down on the letter of credit for the balance sum of RM523,000. shows that the equipment was shipped on board the *Lady Jane* at Port Klang enroute directly to Benghazi. This certainly is not the true situation. The plaintiff admitted that this is not true in their letter to the Hongkong Bank dated 15 February 1993.

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[14] The learned judge goes on to state on the finding of facts before him:

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The plaintiff was aware from as early as 21 January 1993, ie one day after the third party was appointed as the forwarding agent, that the equipment was to be shipped on the ship *Seng Leong* from Port Klang to Singapore and then kept at the Pasir Panjang wharf before it is boarded on the *Lady Jane* from Singapore. This fact can be ascertained from the evidence of plaintiff's witness Brian Nesbitt, who sent a fax to his superior Mr Ball in Singapore informing of the arrival of the feeder vessel *Seng Leong* and subsequent storage of the cargo in Singapore at Pasir Panjang. This proves that the plaintiff knew of the transshipment. The plaintiff also instructed the third party to notify the defendants of the freight charges for Port Klang to Benghazi as the defendant has agreed to pay the freight charges.

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[15] As for the third party, on the facts, the learned judge says:

The third party discharged its obligations as the forwarding agent to the plaintiff and accordingly the third party invoiced the plaintiff for the services rendered. Third party was paid in full vide plaintiff's cheque dated 2 February 1993. The payment was for freight and forwarding agency.

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Under the circumstances, I hold the third party is not liable to the plaintiff as third party had carried out their duties on the instructions given by the plaintiff and the plaintiff was fully aware of what was happening. The plaintiff did not want to associate themselves with the export of this equipment for the reason that such export has attracted the attention of government authorities in London and Singapore in light of then existing embargo against Libya. This is probably the reason why the plaintiff did not want to be named as the shipper or exporter in the bill of lading. As far as the third party is concerned, it merely took instructions from the plaintiff, discharged its duties and get paid for its services.

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[16] As mentioned earlier, pursuant to the amended contract, the defendant paid an advance of RM1,000,000 towards the contract price and in return the plaintiff issued a performance bond. However, on 13 March 1993 the plaintiff obtained an interlocutory injunction prohibiting the defendant from drawing down on the performance bond. In the suit before the learned judge, the defendant sought an order that the interlocutory injunction granted in favour of the plaintiff be set aside to allow the defendant to draw down on it to claim the RM1,000,000. The defendant also claims damages in the sum of RM2,436,806 and interest. In his judgment, the learned judge decided in favour of the defendant and this is what he said:

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On the defendant's counterclaim:

- (a) a sum of RM1,000,000 to be drawn down by the defendant. The interlocutory injunction dated 13 March 1998 obtained by the plaintiff is set aside to enable the defendant to draw down the said sum;

- A** (b) the court is unable to make any award of damages since there was no evidence of damages suffered by the Defendant has been adduced;
- (c) interest at 8% pa on the sum of RM1,000,000 from date of judgment until full settlement;
- B** (d) costs of the action.

C [17] The learned counsel for the plaintiff, who is the appellant before us, submitted that the bulk of the facts is undisputed and the appeal hinges on the finding of facts by the learned judge. If that be the case, it is settled law that this court could not be persuaded to come to its own conclusion on those facts found which is different from the conclusion reached by the court of first instance unless the conclusion reached by the court of first instance is so unreasonable that no reasonable tribunal would have come to that conclusion, which we do not find it occurring here. To this, we have the support of the Federal Court decision in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 where at p 505, Edgar Joseph Jr FCJ said:

D In considering this appeal, we think it is right to say, at the risk of being trite, that like the Privy Council, we adhere to the principle that a trial court is in a more advantageous position to make findings of fact and assessing the credibility of witnesses so that we will not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so. (See *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212). However

E like the Privy Council, we will more readily interfere with the trial judge's inferences based on his findings as we would be in an equally good position as the trial judge to make the determination. (See *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87, at p 94, citing with approval *Benmax v Austin Motors Co Ltd* [1955] AC 370, and followed recently by this Court in *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517).

F [18] Recently, this court on a similar matter in Civil Appeal No W-02-530 of 2000 (unreported), a medical negligence case, through Gopal Sri Ram JCA has this to say:

G 4. Cases of medical negligence are, in the main, facts sensitive. And in a case of this sort where everything turns upon the credibility of witnesses about what was said or not said or done or not done, the view formed by the primary trier of fact is entitled to great weight and we as a court of appeal are not entitled to differ save in an exceptional case. And this is not an exceptional case.

H 5. In our judgment the present case is amply covered by what Lord Robson said when delivering the Advice of the Board of the Privy Council in *Khoo Sit Hoh v Lim Thean Tong* [1912] AC 323:

I The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position and character in a way not open to the courts who deal with later stages of the case.

[19] However, in an attempt to bring the matter outside the principle mentioned earlier, the learned counsel cited various case authorities which would allow the appellate court to review the decision of the trial judge, involving question of facts. He submits that the learned judge has erred in not making a finding of whether both the defendant and the plaintiff knew about the transshipment and acquiesced to the same, notwithstanding the terms of the amended contract and consequently whether the defendant is estopped from objecting to the same. Looking at the evidence presented before the learned judge, we see no merits in the submission. It cannot be disputed that the defendant must have known that the *Lady Jane* only called at Singapore whilst the equipment was at Shah Alam. To get the equipment down to Singapore to be loaded on to *Lady Jane* enroute to Benghazi, a way has to be found. But as far as the defendant is concerned in whatever way it is done, it must satisfy the letter of credit arrangement it had with the party in Libya, ie JOWFE which prohibits transshipment and a similar provisions contained in the LC in favour of the plaintiff. Mindful of this, the third party who was introduced by the defendant to the plaintiff and who was acting for the plaintiff, had properly advised the plaintiff that the equipment should be taken by road from Shah Alam to Singapore or else to get a vessel plying between Port Klang and Benghazi. But the plaintiff disagreed to the proposal so put but would prefer to use the feeder vessel *Seng Leong* to take the equipment at Port Klang and discharge it in Singapore to wait for *Lady Jane*. The defendant was not informed of this other alternative arrangement. In the circumstances, the defendant cannot be clothed with the knowledge of the transshipment to stop it from objecting the claim of the plaintiff. It was also submitted that the defendant signed the certificate of origin and other documents on 20 January 1993 bearing the port of loading or place of export as Singapore thereby giving an inference that transshipment was necessary, thereby imputing knowledge of transshipment upon the defendant. This again in our view, is devoid of any merit because as far as the defendant is concerned the ocean journey is to start from Singapore enroute to Benghazi and not from any other port of origin. The idea of a transshipment is that of the plaintiff who rejected the proposal put forward by the third party to be in compliance with the term of the LC of the defendant with JOWFE. The plaintiff whilst having no objection of the carriage by the *Lady Jane* from Singapore chose to take the equipment from Port Klang by a feeder vessel *Seng Leong* which amounts to transshipment of the equipment.

[20] In *Houlder Brothers & Co v The Merchants Marine Insurance Company, Limited* [1886] 17 QBD 354, transshipment is taken to mean goods transferred from ship to ship although there may be a break in the journey in the interim. In that case, it would appear from the headnote that it was an action brought on a policy of marine insurance subscribed by the defendants on rails shipped on board the steamship *Kirkstall* 'at and from Hull to London, including all risk of craft, until the goods are discharged and safely landed.' On the facts, it appeared that the rails arrived in London, and were discharged into lighters with the intention not of landing them, but of loading them into other ships for exportation to Sydney. Before they were so loaded a gale sunk some of the lighters. It was held that a policy of insurance on goods which includes 'all risk of craft until the goods are discharged and safely landed' does not cover the risk to the goods while waiting on lighters at the port of delivery for transshipment into an export vessel. In his judgment in the Court of Appeal, Bowen LJ at p 355 said:

- A The policy in question includes all risk of craft until the said goods or merchandise be discharged and 'safely landed.' The risk insured against is the risk of the transit upon the lighters which have in the ordinary course of business to convey the goods to the shore. The nature of this risk can be perfectly appreciated and estimated by the parties to the contract. Landing goods means putting them upon the land, or upon that which by custom of the port is its equivalent. In the present case, instead of placing the goods on lighters to carry them to the shore, the goods were placed upon lighters which were to take them to an export vessel and there to load them as soon as she was ready to receive them. Such transshipment, however usual in the trade, is not the same thing as landing the goods directly and immediately upon the quay. A lighter which has to land its cargo has only to make for the quay and to wait its turn in accordance with the usages of the port. A lighter which is intended to transship the goods to another ship may have to wait for its arrival and till it is ready to take the cargo, and may thus be subject to additional risks of exposure to the weather and of collision with other vessels or barges in the dock.... Cargo discharged upon lighters for transshipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once.... Nobody, in commercial or business language, can say that goods which are placed in lighters for transshipment are placed in lighters to be landed.... But this falls short of proving that by any custom transshipment is equivalent to landing.
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- E [21] This case cited explains the meaning of transshipment, to mean the transporting of cargo by means of a vessel to an export vessel which is to take the goods to its port of destination. Coming back to our case, the equipment under contract were originally to be transported from Port Klang to Libya or beneficiary godown as so provided by Hong Kong Bank in the LC, the same condition stipulated in the LC given by JOWFE to the defendant prohibiting transshipment. Subsequently, by agreement the contract was amended to allow shipment from Singapore instead of Port Klang but still with the prohibition of transshipment of the cargo to Libya. Instead of taking the advice of the forwarder to either take the equipment by land to Singapore or be loaded at Port Klang by any other ship than *Lady Jane* for a straight journey to Benghazi in Libya, the plaintiff chose to use a feeder vessel *Seng Leong* to transport the equipment from Port Klang to Singapore before being loaded on to *Lady Jane* in Singapore to carry the equipment from there to Benghazi. By using the feeder vessel, in the circumstances of the case, the plaintiff went against the term of the LC by means of a transshipment of the equipment destined for Libya.
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- H [22] Another case in point is *Anglo-American Oil Company, Limited v Port of London Authority* [1914] 1 KB 14, which is more direct on the point of transshipment which may include storage pending the arrival of another ship. Hence, storage on land for a period does not necessarily alter a transshipment journey of goods. In this case, the dispute between the plaintiffs and the defendant is over port rates. The plaintiffs claimed for exemption from port rates but the defendant said otherwise. By s 9 of the Schedule to the Port of London (Port Rates of Goods) Provisional Order Act 1910, goods imported for transshipment only are exempt from port rates, and it is provided that:
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for the purposes of this section the expression 'goods imported for transshipment only' shall mean goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and

proved... (1) to have been intended for transshipment at or before the time of the report of the ship at the Custom House or within seventy-two hours thereafter... and (2) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port.

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[23] According to the case headnote, the plaintiffs received in the Port of London from beyond the seas a large quantity of oil in bulk by their ocean tank steamer *Narragansett*. When that steamer was reported at the Custom House the plaintiffs intended to transship to various ports in the United Kingdom specific quantities of the oil she brought, and they accordingly delivered to the defendants inwards port rates exemption certificate under s 9 of the Port of London (Port Rates on Goods) Provisional Order Act 1910, showing the quantity in tons they intended to transship to each port. The oil from the *Narragansett* was discharged into the plaintiff's tanks at Purfleet, some of which were empty at the time, and some contained oil intended for distribution in the London district and also oil discharged from previous steamers. From these tanks the plaintiffs subsequently loaded the various quantities of oil mentioned in the inwards port rates exemption certificates, and conveyed them by small tanks steamers to the ports mentioned in the certificates. The plaintiffs then delivered to the defendants outward port rates exemption certificate for the oil so transshipped, and claimed exemption from the payment of port rates in respect thereof. The defendants refused to admit the plaintiffs' claim for exemption on the ground, inter alia, that as the oil brought by the *Narragansett* had been mixed in the tanks with other oil not intended for transshipment, the identity of the oil transshipped with that imported could not be certified and proved so as to comply with s 9 of the Act. But it was held by the court that the oil transshipped had been sufficiently identified with that certified for transshipment, and therefore that the plaintiffs were entitled to the exemption claimed. So, the transshipment here involved the transfer of the oil brought by the *Narragansett* to the Port of London from a place beyond the seas to various ports in the United Kingdom in specific quantities by other small tank steamers. Just as in our case, the element of transshipment is involved when the equipment was transported from Port Klang by a feeder vessel *Seng Leong* to Singapore to be loaded onto the ship *Lady Jane* to carry the equipment from there to the Port of Benghazi, Libya. This surely is contrary to the stipulation in the LC provided by Hong Kong Bank prohibiting the transshipment of the equipment from Malaysia to Libya via Singapore.

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[24] It was further argued that the defendant received the bill of lading on 2 February 1993 which clearly states on its face that the port of loading is Port Klang and the defendant did not object to it but acted on it and submitted the bill of lading to JOWFE and got paid in full. The simple answer to that is that there was no evidence that suggest collusion between the plaintiff and the defendant that there was to be a transshipment of the equipment from Malaysia to Libya. It was an act done by the plaintiff against the advice of the third party which is not within the knowledge of the defendant. As far as the defendant is concerned, there should not be any transshipment. The bill of lading on its face does not suggest any transshipment. It was from Port Klang in Malaysia to Benghazi in Libya. If at all there is to be any dissatisfaction on the part of the defendant is that the ocean journey did not commence from Singapore as expected. However, the subsequent

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- A** amendment to the port of loading of the equipment allows it to be either through a Malaysian port or Singapore port. Therefore, in as far as the defendant's LC with JOWFE is concerned there was compliance to entitle the defendant to be so paid which was the condition expressed in the term of the amended contract between the plaintiff and the defendant. The falsity, if at all, as to the description in the bill of
- B** lading was not created by the defendant. The cause of the transshipment was created by the plaintiff who disagreed with the view of the third party that since *Lady Jane* operates from Singapore, the equipment should be carried by road to Singapore to be loaded onto *Lady Jane* for the journey to Benghazi, Libya. So, on the fact, we find that the learned judge did not err in the making of his decision in the case dismissing the action of the plaintiff against the defendant and allowing the counterclaim of the defendant.
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[25] We now come to deal with the action of the plaintiff against the third party which the learned judge also dismissed. Against the third party, the plaintiff sought:

- D** (a) declaration that the plaintiff is entitled to be indemnified by the third party;
- (b) judgment for any amount due from the plaintiff to the defendant; and
- (c) judgment for any costs paid by plaintiff to the defendant and plaintiff's costs for the proceeding against third party.
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- [26] As earlier noted, the third party acted for the plaintiff upon introduction by the defendant as a forwarding agent. The third party must be aware of the non-transshipment provisions of the equipment to be sent from Malaysia to Libya. *Lady Jane*, the ship to be used for the transport of the equipment was to be at Singapore port but the equipment was in the godown at Shah Alam and Port Klang is the nearest port in Malaysia and *Lady Jane* was not to be at Port Klang. So, on the appointment, the third party representative proposed to the plaintiff that the equipment must be taken by road to Singapore to be loaded on to *Lady Jane*. The reason for the proposal must have been to be in compliance with the two LCs.
- F** But the plaintiff disagreed on the proposal. So, what is the choice left so as to get the equipment to be in Singapore to commence its journey on *Lady Jane* to Libya? The idea of a feeder vessel *Seng Leong* to carry the equipment from Port Klang to Singapore then cropped up which the plaintiff willingly agreed. The plaintiff who was well aware of the non-transshipment provisions was ready for the risk. It is not the third party that insisted that a feeder vessel be used instead in defiance of the non-transshipment provisions. It was the alternative left for the equipment to be in Singapore as the plaintiff had refused the proposal for the journey to commence by road to Singapore. The plaintiff was aware at all material times of the mode of shipment. The bill of lading prepared and dated 2 February 1993 which was sent to the defendant by the third party at the instruction of the plaintiff did not represent the true state of affairs. It named Port Klang as the port of loading by *Lady Jane*, knowing fully well that *Lady Jane* would not be calling at Port Klang. The document also named the port of discharge and place of delivery being Benghazi in Libya. There was no mention at all made of the feeder vessel, *Seng Leong* and the column 'precarriage by' was left blank. Thus, on the face of the document there appear to be
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no transshipment of the equipment from Malaysia to Libya. But all the misdeeds cannot be attributed to the third party who merely carried out the instruction from the plaintiff.

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[27] But the learned counsel for the appellant before us submitted that the third party knew or must have known as an experienced freight forwarder, that the arrangement made would involve transshipment of the equipment and would jeopardise the payment under the LC. Yet the third party did not warn the plaintiff of the danger or advise the plaintiff as to what steps it could take to regularise the transaction, to ensure that the bill of lading complied with all respects with the LC. We see no merit in the line of submission on the basis of what has been said earlier. We, therefore, find no error committed by the learned judge in arriving at the finding of non-liability of the third party.

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[28] In the upshot, for the reasons given, the appeal by the plaintiff against the defendant and the third party is dismissed with costs to both the respondents. The deposit is to account of taxed costs. The decision of the learned judge is affirmed.

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[29] My learned brothers, Richard Malanjum and Arifin Zakaria JJCA has read the draft and had given their agreement thereto.

Plaintiff's appeal dismissed with costs.

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Reported by John Paul Simon

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